



Andrew J. Pepin
Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Ave., SW
Room 5106, Potomac Center Plaza
Washington, DC 20202-2600

***RE: June 1, 2009 Determination Letter for the District of Columbia:
Show Cause and Request for a Hearing and Reconsideration of the Decision to
Suspend Funds Pending a Hearing***

Dear Mr. Pepin:

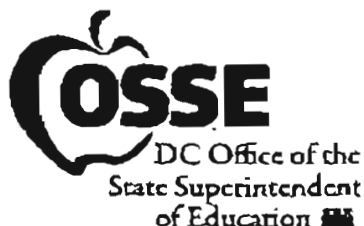
This letter responds to the June 1, 2009 determination letter from Patricia J. Guard, Acting Director of the Office of Special Education Programs, notifying the District of Columbia that the Department intends to withhold 20 percent of D.C.'s FFY 2009 funds reserved for state-level activities under section 611(e) of the Individuals with Disabilities Education Act (IDEA).

On behalf of the District of Columbia, the Office of the State Superintendent of Education (OSSE) hereby respectfully (1) requests, consistent with IDEA section 616(e)(4)(A) and 34 C.F.R. §300.605(a), a hearing to appeal the Department's decision to withhold FFY 2009 state-level funds and also (2) shows cause, consistent with 34 C.F.R. §300.605(b), why the Department should not suspend payment of those funds pending the outcome of the hearing.

Suspending and eventually withholding these funds would significantly impede the very activities critical to District compliance with IDEA and materially hinder reform efforts that currently are improving educational results for children with disabilities in the District. Our arguments are two-fold:

- It is not a reasonable and fair exercise of discretion to withhold funds based on a snapshot of the past when the present-day facts and circumstances are materially different; and
- The suspension and withholding of these funds will do real harm to improving educational outcomes for vulnerable children in a setting where state-level activities are making concrete headway.

We welcome you to hold OSSE accountable for our results, and do not contest the need for intervention, as implicitly recognized in the initiatives that we have already undertaken to correct deficiencies in special education programs of the District of Columbia. However, we strongly contest the proposed intervention of withholding funds from OSSE. OSSE is a new state agency, with new leadership that has made a significant commitment to the reform of special education protections and services. With due respect, it makes no sense and is unfair and counter-



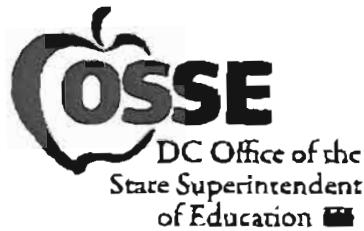
productive to withhold funds that we need to implement this effort based on the fact that a prior compliance agreement with a different state agency from 10 years ago did not result in compliance. We respectfully submit that it is essential to take into consideration the agency's efforts to reform special education; our progress as a new agency in addressing many of the specific problems that are the basis for your findings; our efforts to be honest about and address inadequacies in the accuracy and reliability of old data, the impact of such a withholding on students and the programs that serve them, the significant change in leadership since the District entered into the 1998 compliance agreement over a decade ago, and the level of effort required to implement real, systematic reform. Such reform is particularly challenging in a jurisdiction whose annual number of due process complaints exceeds the sum of all other jurisdictions, where more than 12% of students are in private placements and whose special education system has been under court oversight in multiple class actions for decades.

As you know, the District is a unique jurisdiction and the state of its special education system has no parallel. In addition to being a high-risk grantee with special conditions imposed on its federal education grants, the District is also accountable to a federal court consent decree in *Blackman Jones* for failure to serve children with disabilities under IDEA. Reform of a system such as this does not happen overnight and requires the sustained and coordinated support and resources from federal and local agencies, as well as input and buy-in from community stakeholders, if it is to last.

This administration has not taken a band-aid approach. Rather, the District has chosen to leverage the federal agency and federal court oversight and accountability to implement sustainable, systematic reforms. On the surface, this takes longer but results in better educational results for children with disabilities. Each time the SEA is confronted with a particular policy issue or compliance failure, the OSSE must identify and diagnose the problem; explore potential options; apply resources, including internal experts and technical assistance, to fashion a solution that will work in the District's peculiar circumstances; and seek community input and buy-in before actually implementing the solution.

As this letter will show, withholding funds at this critical period would undercut the role that a strong SEA can play in reforming special education in the District. As a practical matter, the OSSE cannot hire or employ staff if designated funds are not available due to the legal constraints of the District's Anti-Deficiency Act. Suspension or withholding of state-level activity funds, even if restored sometime later in the year, would mean the loss of approximately 7 experienced and knowledgeable staff – the very staff who would be working on improving special education programs within the District.

It is appropriate to consider current results and circumstances that have changed since the Annual Performance Report (APR) results on which the Department based its decision to suspend and withhold funds. One of the critical first steps to bringing the District into IDEA



compliance was the creation of the OSSE as a stand-alone SEA on October 1, 2007.¹ The Department noted the effect in last year's June 16, 2008 determination regarding special conditions on all federal grants, "...the DC OSSE takes very seriously its responsibility to address long-term deficiencies identified by the Department and other sources related to Federal program administration. The steps that DC OSSE has already taken ...demonstrate progress toward addressing the deficiencies and exemplify DC OSSE's commitment to resolving these issues." This commitment has not waived and is substantiated by continued measurable progress in the attainment of compliance.

The OSSE does not contest the Department's determination for the FFY 2007 APR that the District of Columbia continues to need intervention in meeting the requirements of Part B of the IDEA consistent with the determinations in FFY 2005 and FFY 2006. Those results, however, should be evaluated and considered through the lens of the significant governance changes that have since occurred. FFY 2008 is the first year the OSSE had authority over the state special education functions in the District of Columbia. The 2007 APR reflects the best and most accurate assessment of circumstances that pre-dated current leadership at the OSSE and – more importantly – are being diagnosed and remedied by new leadership.

If improved educational results and functional outcomes for children with disabilities is the ultimate goal of the state's role in fostering IDEA compliance (*see* 34 CFR 300.600(b)), the SEA must be given credit for making the commitment and taking the time to accurately assess the circumstances it has inherited so that sustainable solutions are developed. Further, while it would be easier to mask problems related to data integrity, the leadership at the OSSE has instead chosen to be transparent in its efforts to identify current data challenges and build a more solid foundation against which to measure future progress. The leadership has taken this step because without accurate data, any solution is a mere guess- identifying the root cause remains an impossibility and reform efforts cannot be authentic.

Depriving the SEA of resources at this critical juncture will harm the federal interest in improving educational outcomes for children with disabilities. The District is producing improved results at the fastest possible pace while being mindful of the extensive and productive public participation requirements of the IDEA. Those requirements exist for a reason – real reform requires stakeholder input. Each step of sustainable reform is as lengthy as is required to correct and supplant entrenched systems that resulted in noncompliance. In essence, this decision penalizes the very teams that have produced concrete results in the District over the past year and a half for the behavior and lack of accountability of others in the past.

We believe the following facts reflect concrete steps toward improving compliance with IDEA in a sustainable manner in the District and should be considered by the Department in its discretion

¹ The Public Education Reform Amendment Act of 2007, effective June 12, 2007, (DC Law 17-9) created the OSSE as a new state education agency and all state-level education responsibilities transferred to the OSSE on October 1, 2007.



as to what enforcement action to take under 34 CFR 300.604(b). Each of these examples illustrates the critical importance and real results obtained from IDEA funds allocated for state-level activities.

Disproportionate identification of minority students (Indicators 9 and 10): The Department's determination rests in part on the fact that the District could not provide accurate and reliable data on disproportionate representation of minorities for FFY 2005 - 2007. The District takes the issue of disproportionate representation very seriously. The majority of our public school population consists of members of minority groups, located exclusively in an urban center. In some cases, individual LEA populations consist entirely of a single race/ethnicity. Given this fact, traditional definitions of disproportionate representation are not meaningful. The District made a commitment early on to rethink its approach in the face of inaccurate and incomplete data and unworkable past policy decisions. After diagnosing the problem, the OSSE sought and received extensive technical assistance leading to the agency's realization that the current definition of disproportionality is not appropriate nor sufficiently flexible to allow the SEA to genuinely determine whether an LEA is disproportionately identifying students. The unusual demographic qualities of LEAs in the District (which vary widely in size as well as racial make-up) require a new definition. Based on the technical assistance sought by the OSSE over the past year, the agency is poised to present the new definition to its State Advisory Panel this month where it will seek the broad stakeholder input required of IDEA when making such changes to the State Performance Plan. This will allow the OSSE to implement a new definition this upcoming school year and gather the kind of accurate and reliable data required before taking any necessary, effective enforcement actions.

Timely Due Process Hearings (Indicator 17): The critical Indicator 17 on the percentage of fully adjudicated due process hearings within the requisite timeline exemplifies the dilemma presented by the absence of valid and reliable data. After the OSSE's examination of the data for FFY 2006 maintained by the state education agency located within DCPS and the data collection and maintenance methods used in FFY 2007, the OSSE declined to provide unreliable data in its APR for those Federal fiscal years. However, the OSSE has since remedied the problem and implemented an accurate and reliable data system which can provide valid and reliable data for FFY 2008 through a state of the art special education hearing docketing system implemented beginning August 11, 2008. The data reveal that since January 2009, the OSSE has sustained a consistently high level of compliance in the timely adjudication of due process hearings, which should also be considered by the Department in deciding whether to withhold funding:

| 2009 Due Process Hearing Timely Adjudication Rates | | | |
|--|----------|--------|--------|
| January | February | March | April |
| 95.36% | 91.67% | 95.60% | 95.24% |



The progress on these indicators would have been hindered absent state-level activity funds. Maintaining those funds is also critical for achieving measurable progress on implementation of due process hearing decisions.

Timely Implementation of Due Process Hearing Decisions. The measureable progress evidenced on Indicator 17 also is demonstrated in other identified areas of noncompliance. For example, for the reporting period of July 1, 2007 to June 30, 2008, the timely implementation of due process hearing decisions with due dates was at 37.1 %. Recently compiled data reveal measureable progress in that timely implementation has risen to 56.5% from July 1, 2008 through May 31, 2009 for all due process hearing decisions with due dates.

Placement Policy. The OSSE implemented a technical assistance program at the beginning of this school year that has resulted in a 45% reduction in the rate of placement of students considered for nonpublic placement out of independent charter schools. As a result of implementing this innovative model, which combines IEP team consultation (including IEP review, resource identification, and solution-focused problem solving) with the provision of targeted technical assistance and training, significantly more students are remaining in their LEAs to be served in the least restrictive environment. To build on this success, the OSSE is currently expanding this initiative to the District of Columbia Public Schools (DCPS), our largest LEA. Implementing this policy requires significant OSSE staff hours which would be jeopardized by withholding of funds.

System of General Supervision. Finally, while the determination letter recognizes that the OSSE has undertaken specific remedial activities to ensure children with disabilities are placed in the least restrictive environment and to develop a system of monitoring, these recognitions are qualified by the statement that the OSSE has not yet conducted general monitoring to ensure compliance. Consistent with its commitment to the Department in the May 15, 2009 progress report, the OSSE introduced a comprehensive monitoring framework to all LEAs in February of 2009, followed up with providing individualized technical assistance on all components of the framework in March and April, and commenced focused monitoring of local educational agencies in May 2009. Significant staff hours will be spent drafting the resultant reports and implementing corrective and enforcement actions. To further improve our system of general supervision and position the state complaint process as a viable alternative to time-consuming and costly due process hearings, the OSSE has drafted revised state complaint procedures. We expect to release these proposed revisions for public comment and finalize before the beginning of the next school year. The effectiveness of the above efforts is dependent on a stable source of state-level IDEA funds.

OSSE's establishment and implementation of the efforts described above demonstrate the OSSE's continued scrutiny and reform of all aspects of the system of general supervision since the transfer of the state-level education functions to this new state agency. The OSSE has the commitment of leadership and the ability to meet its agreements and to sustain steady and measureable progress. Under the OSSE's system of general supervision, the District of Columbia



DC Office of the
State Superintendent
of Education

can attain compliance with IDEA Part B, if provided the opportunity. However, suspending and withholding state-level activity funds will jeopardize outcomes such as those described above in material ways, effectively delaying reform.

Conclusion. In sum, the OSSE requests that the Department reverse its decisions to suspend payment of, and ultimately withhold, FFY 2009 state-level activities funds and instead consider appropriate enforcement action that would hold the District accountable in a manner that helps sustain the OSSE's critical reforms. The serious enforcement actions to withhold and suspend funds are unnecessary to ensure compliance and will exacerbate a complex and difficult undertaking. In fact, these enforcement actions will impede the OSSE's progress during this critical period of reform and compliance and harm the Federal interest the IDEA is intended to protect-the educational outcomes for children with disabilities and due process for their parents.

Instead, the OSSE requests that the Secretary exercise the discretionary authority to enter into an agreement with the District of Columbia to enable the OSSE to remain eligible to receive essential State-level funding while coming into full compliance as soon as feasible. An agreement represents a viable means of bringing about compliance based on the actions OSSE has already taken to comply; the significant commitment of resources and personnel; the ability to come into compliance; and demonstrated ability to make steady and measurable progress toward that objective while such an agreement is in effect.

This is a new agency with new leadership resolute in its commitment to correcting the identified areas of noncompliance that affect the provision of special education and related services to the District of Columbia's children with disabilities. To employ excessive enforcement strategies based on historical relationships and data is unnecessary to correct the noncompliance, is patently unfair, and negatively impacts the very individuals the IDEA is intended to protect - children with disabilities and their parents. I hope that you will reconsider the enforcement action. Please do not hesitate to contact me if you have additional questions or would like to discuss these issues in more detail.

Sincerely,

Keri L. Briggs, Ph.D.

Acting State Superintendent of Education

Cc: Secretary Duncan